THE INDEPENDENT

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HELENA, MONT., DEC. 30, 1889.

THE JUDGMENT OF THE SENATE.

We have presented the view taken by the people generally of the situation of affairs growing out of the usurpation of the canvassing board of Silver Bow county in attempting to throw out precinct 31, which resulted in inaugurating rival houses of the Legislative Assembly. While it will always remain a mystery to the electors of Montana how it was that men in this instance were sought to be canvassed into office, instead of elected, according to the laws, customs, and usages of the country, they are anxiously awaiting the result of such a performance, and looking forward to an adjustment of the affair upon a just and legal basis. Taking, however, the status of things as it now exists, they are naturally led to inquire, first, What will be the probable action of the United States Senate upon the admission of members elected by either body claiming to be the legally-organized House of Representatives? and, second, What is the true legal status of affairs under the laws applicable to the situation? Upon the former proposition, while we are not entirely without precedent, and the question may to some extent be a matter of speculation, the latter is susceptible of as certain a solution as any mathematical proposition.

Taking these propositions in their order, and bearing in mind that according to established precedents "The election of a senator in congress is not in the nature of an ordinary legislative act" that "it is an election and not the enactment of a law," and that "of the validity and bona fides of such an election the senate of the United States is the sole and exclusive judges," it would at once be conceded that a body like the United States senate would investigate fully the merits of the controversy. In other words the authority to examine into the question as to who was actually elected members of the house, devolved upon it a corresponding duty to see that the great principles of our government involving the sovereignty of the people and purity of the ballot were vindicated and preserved. Without further comment upon this question we quote at large from section 516, McCrary of elections, and the report of Senator Carpenter, of Wisconsin, which was adopted by the United States senate in the forty-third congress, first session report 291, McCrary section 516, says:

Inasmuch as senators of the United States are chosen in each state by the legislature thereof, it is manifest that the senate may sometimes find it necessary to inquire and determine whether a body claiming to be the legislature of a state is in fact such. If two bodies have organized, each claiming to be the legislature, and each has elected a senator, of course the senate, in order to decide between them, must enquire and determine which was the legislature. Such a case arose in Sykes vs. Spencer, in the senate of the United States, (forty-third congress, first session, report number 291). And in determining that case the senate of the United States laid down a rule which may at first appear to be, but which is not in reality, in conflict with the doctrine we have been considering in the preceeding sections of this chapter. The contest between the two legislatures in this case depended upon this: In one body were eight or nine members who had received regular certificates of election, but who were conceded not to have been elected, while in the other was found an equal number of persons duly elected, but without certificates of election. To make a quorum of the former body, it was necessary to count the persons holding certificates, but not elected, and to make a quorum of the latter, it was necessary to count the members duly elected, but without certificates. The former body was called the state house legislature, while the latter was called the court house legislature.

The senate held that the body having a quorum of members in fact duly elected, should be regarded as the legislature of the state, for the purpose of electing the senator in congress, and the grounds of this decision are thus stated in the committees, report, submitted by Senator Carpenter of Wisconsin:

The matter, then, comes to this: The state house legislature was the legislature in form, and the court house legislature was the legislature in fact. While these two pretended legislatures were in existence, each claiming to possess the legislative power of the state, Spencer was elected to the senate by the court house legislature, and Sykes was elected by the state house legislature. Spencer was first elected, and on the day of his election the court house legislature was recognized by the governor as the legal legislature of the state. Therefore, in determining as to the right of Spencer or Sykes to this seat, the senate is compelled to choose between the body in fact elected, organized, acting and recognized by the executive department as the legislature, and another body, organized in form, but without the election and without a recognition on the part of the executive of the state at the time they pretended to elect Sykes. When we consider that all the forms prescribed by law for canvassing and certifying an election, and for the organization of the two houses, are designed to secure to the persons actually elected the right to act in the offices to which, in fact, they have been elected, it would be sacrificing the end to the means, were the senate to adhere to the mere form, and thus defeat the end which the forms were intended to secure.

The persons in the two bodies claiming to be the senate and house of representatives who voted for Spencer, constituted a quorum of both houses of the members actually elected; the persons in the state house legislature who voted for Sykes did not constitute a quorum of the two houses duly elected, but a quorum of persons certified to have been elected to the two houses. Were the senate to hold Sykes' election to be valid, it would follow that erroneous certificates, delivered to men conceded not to be elected, had enabled persons who in fact ought not to vote for a senator to elect a senator to misrepresent the state for six years. On the other hand, if we treat the court house legislature as the legal legislature of the state, it is conceded that we give effect to the will of the people as evidenced by the election. So that, to state the proposition in other words, we are called upon to choose between the form and the substance, the fiction and the fact; and, considering the importance of the election a senator, in the opinion of your committee the senate would not be justified in overriding the will of the people, as expressed by the ballot box, out of deference to certificates issued erroneously to persons who were not elected.

In the opinion of your committee it is not competent for the senate to inquire as to the right of individual members to sit in a legislature which is conceded to have a quorum in both houses of legally elected members. But, undoubtedly, the senate must always inquire whether the body which pretended to elect a senator was the legislature of the state or not; because a senator can only be elected by the legislature of a state. In this case, Spencer having been seated by the senate, and being prima facie entitled to hold the seat, the senate cannot oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the court house and the state house. We cannot oust Spencer from his seat without inquiring and determining that the eight or nine individuals, who were elected were not entitled to sit in the legislature of the state, because they lacked the certificates. But if the senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It cannot be maintained that when the senate has been compelled to enter upon such an examination it is estopped by mere prima facie evidence of the fact, and the certificate is conceded to be nothing more than prima facie evidence. But the senate must go back of that to the fact itself and determine whether the persons claiming to hold seats were in fact elected. When we do this, we come to the conceded fact that these persons lacking the certificate had in fact been elected, and that the persons who claimed to be a quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses.

Assuming, therefore, for the bare sake of argument that the certificates given by the state canvassing board to the five members of the rump house at the Granite block, were sufficient to entitle them to seats for the purpose of organization, and that the five members at the court house house of representatives without certificates, to be declared by a court of competent jurisdiction to be entitled to the certificates and you have parallel cases to the one just cited. Indeed a much stronger case is here presented by the court house house of representatives, for that in addition to the recognition thereof by the governor of the state, the members without the certificate of the state canvassing board, in a direct proceeding to determine whether precinct No. 31 should be counted, obtained a judgment of the court in their favor, which insured their election and became and is the law of the case until set aside or reversed; and as between the parties to that proceedings, i. e., the five members at the Granite block with certificates of the state canvassing board, and the five members at the court house without the certificates of the state canvassing board, the matter cannot be questioned collaterally. This being the case until the right of the members at the court house to the certificates held by the members at the Granite block, if of any value, is in some way impeached, they are the legally elected members of the house of representatives of the state of Montana, and entitled to exercise the functions of such office. Indeed it would be difficult to perceive how one supreme co-ordinate branch of the government could be eliminated by the judicial decision of another co-ordinate branch was the question properly presented in a direct proceeding for that purpose.

Enough has been said to show that, according to principle and precedent, the senators in congress elected by the House of Representatives of Montana having a majority of the members actually elected will be recognized by and admitted into the Senate of the United States, and that those elected by the body a portion of whom hold the empty certificates of the state canvassing board, contrary to the returns of the election, and upon which depends its organization, will have no standing there.

Turning now to the second proposition, how do we find it? The questions here legitimately involved may properly be considered under two heads.

1st. Is the ordinance under which the state canvassing board assumed to issue certificates of election of any validity?

2nd. If so, does it authorize the board to declare the result, issue certificates, and repeal the statutes applicable to the election of members of the Legislative Assembly?

One of two things must exist to give validity to the ordinance. It must have been created through the inherent power of the people, reserved to them and not delegated away, or it must be enacted by a convention upon which such unreserved and delegated powers have been conferred. Upon the former theory we are met at the very threshhold with the fatal objection that the people, in their inherent capacity, have never been called upon to act nor assumed to act upon the question. The ordinance was not contemplated at the time the members of the convention were elected, and it was never submitted to the people for their ratification or rejection. In no sense, then, can it be said to emanate from the exercise of that inherent power co-eval with the existence of mankind. If the power to create the ordinance existed at all, it is by virtue of the legislative functions of the convention that made it. To properly comprehend the question it is necessary to consider the condition of things at the time of its enactment. It must be borne in mind that this ordinance was enacted by the convention while the state was a territory, and actually subserved its purpose as such before our territorial relations had been dissolved. It is on account of that relation the very gravamen of the question is involved. The subjects of this government have delegated away just such inherent powers as are contained in the provisions of our national constitution. Under it congress has the exclusive authority to dispose of the public domain, and make all needful rules and regulations for the government of the territories. And so it is, in the passage of the ordinance, there were no independent legislative functions belonging to the territory on account of which the convention could asume to act under any sovereign power of the people.

The power of congress to delegate legislative authority to the legislative assemblies of the territories has too long been recognized and exercised to be now an open question. Hence the source and power of such legislation is vested in congress and the territorial legislative assemblies. The legislative functions thus conferred continued to exist until they were wiped out by the adoption of the constitution of the state under its enabling act. From thenceforward it is vested in a senate and house of representarives to be designated, "The legislative assembly of the state of Montana." It is clear that nowhere else can be found any such powers. The formation of the constitution, and its submission to, and adoption by the people, which alone give it validity, were done under an act of congress and by virtue of the powers especially conferred upon the convention. The inherent power once existing in the people being delegated to congress under the constitution, the convention created for a particular purpose, possessed just such powers as were expressly granted and none were conferred by implication except such as were absolutely necessary to the exercise of the of the power granted. Had the territory been an independent sovereignty at the time of its admission, no question of power in such case could arise. It grows out of the peculiar and dependent relation of the territories to the national government. Nor can this ordinance be justified upon the grounds of necessity, which has hitherto been a favorite plea of the republican party. It will be shown that the territorial laws applicable to the election of members of the legislative assembly were in full force; that ample and complete provisions are made for all that is contemplated by the ordinance, and that the members receiving the certificates of election of the clerks of the respective counties are entitled to their seats for the purpose of organization, and that the rump house is not only a rump house in name but a rump house in fact.

We cannot close without again expressing the belief that the Senate of the United States, in so far as the election of members to that distinguished body is concerned, will adhere to its former precedents, rescue from the hands of the despoiler the sacred rights of the ballot, and thereby vindicate the right and condemn the wrong.

However much we regret that good men and good representatives of the republican party have been deceived by designing men and politicians, in placing too much confidence in their reckless statement of facts, we are not of those who believe that the principles of justice and fairness have flown from the chambers of the American Senate nevermore to return; but rather indulge the opinion that all things will be righted at the proper time, and that the persons elected senators in congress by the Court-house House of Representatives, recognized by the chief executive of the state, elected by the votes of the people, and organized according to law, will fill the positions to which they shall be elected.

MONTANA candidates for federal offices, in the absence of senators from this state, are seeking aid from republicans of other states. Carter is on their trail, however, and it don't work.

THE far-reaching blizzard is hovering over the unhappy country to the east of us and reminds us that Montana is the only land of pure delight.

AFTER all what will it profit a man to be elected by a rump legislature and lose the seat for which he is reaching?

SANDERS and Mantle will be run through the Rickards process to-night.

NOT a very cold is a grip.

CROSS-CUTS.

Never kick a man when he is down. It's a waste of energy. Go for the man who is climbing above you.—Philadelphia Inquirer.

He (after a tiff)—So you persist in breaking the engagement?

Mature Fiancee—Certainly; what do you take me for?

He—About 40. Better think it over; it may be your last chance.

At a tailor's: "Don't you know of some way to prevent my trousers getting out of shape when I sit down?"

"Yes; but——"

"What must I do?"

"Take them off first."—Judge.

A Kentucky gentleman who recently came to Washington to consult with his member of congress about an office under the new administration was asked yesterday by a gentleman from Boston whether it is really true that the people of Kentucky are so very bibulous.

"Bibulous!" said the Kentuckian. "Bibulous! I don't reckon you could find a dozen Bibles in the whole state."—Washington Post.

Mrs. Literary—Do you believe with the poet that reading makes a full man?

Mrs. Practical (sighing)—I don't know that reading makes a full man, but I am convinced that a club-reading room does.—Texas Siftings.

Mrs. Hilough—The paper says there were two men killed in Colorado by falling over a bluff.

Mr. Hilough (absently)—Great Scott! I wonder what the ante was.—New York Sun.

Montana is a very young state as yet, but any one with a fairly good nose can tell from the odor of her politics that she is very strong for her age.—Philadelphia Press.

First Pullman Porter—Whad's yo' ser nervous 'bout, Johns'n? Second Porter—I'se a quartah out. Dat's what I's nervous 'bout. Done blacked a pah of my own boots by mistake for dat nabob's in d' fo'th suction.—Exchange.